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Via Electronic Mail

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\*NOT ADMITTED IN D.C.

The Honorable Kenneth Salazar  
Secretary of the Interior  
U.S. Department of Interior  
1849 C Street, NW  
MS 4141-MIB  
Washington, D.C. 20240  
Attn: Ms. Mary Milam

Re: Comments regarding the Department's draft Tribal Consultation Policy

Dear Secretary Salazar:

On behalf of the following seventeen federally recognized Indian tribes and Alaska Native villages, the Rosebud Sioux Tribe, the Eastern Shoshone Tribe, the Turtle Mountain Band of Chippewa Indians, the Oglala Sioux Tribe, the Assiniboine and Sioux Tribes, the Shoshone-Bannock Tribes, the Standing Rock Sioux Tribe, the Three Affiliated Tribes, the Shoshone-Paiute Tribes, the Native Village of Eyak, the Manley Village Council, the Chickaloon Village Traditional Council, the Healy Lake Traditional Council, the King Island Native Community, the Egegik Village Tribal Council, the Nome Eskimo Community, and the Naknek Village Council, we respectfully submit these comments regarding the *Department of the Interior Policy on Consultation With Indian Tribes* ("draft Policy").

## **I. Introduction**

These comments are submitted in response to Deputy Chief of Staff, Laura Davis's January 14, 2011 Dear Tribal Leader letter in which the Department of the Interior ("the Department") opened a period for tribal comments on the draft Policy.

We commend the Department for preparing a new agency-wide Tribal Consultation Policy and for seeking tribal feedback—in advance of the 60-day public comment period—on how to best improve communication between Department agencies and Indian tribes or Alaska Native communities. We also appreciate the Department’s initial efforts to solicit tribal views as it assessed its current tribal consultation practices and formulated the draft Policy. These efforts included: hosting Department meetings in cities across the country with tribal representatives; establishing a Tribal Consultation Team to draft a policy; and requiring all Department agencies to examine and change their own consultation policies to ensure consistency with the final approved Department of the Interior Consultation Policy.

## **II. The Department’s Draft Policy Proposes Positive Steps to Improve Tribal Consultation**

We agree with the Department’s guiding principles for the draft policy, particularly its view of tribal consultation as “a deliberative process that aims to create effective collaboration and informed decision making where all parties share a goal of reaching a decision together and it creates an opportunity for equal input from all governments.” Draft Policy at 1. We further agree with the Department’s position that “[f]ederal consultation that is meaningful, effective, and conducted in good faith makes the Department’s operation and governance practices more efficient.” *Id.* Equally important, we commend the Department for recognizing “[t]he obligation for Federal agencies to engage with Indian Tribes on a government-to-government basis” and for affirming that “[f]ederal agencies meet that obligation through consultation.” *Id.*

As Deputy Secretary David Hayes and Assistant Secretary-Indian Affairs Larry Echo Hawk recognized in their November 23, 2009 letter to tribal leaders, the Department of the Interior is “the primary agency responsible for interacting with Indian tribes.” Because of the significant impact of the Department’s programs on American Indians and Alaska Natives, your Department has the highest responsibility in the federal government to ensure that its tribal consultation policy exemplifies the special legal relationship between the United States and Indian tribes. These guiding principles should therefore inform every Departmental undertaking at all levels of administrative decision making.

We commend the draft Policy’s recognition of the importance of timely consultation with tribal governments. During the “Initiation” stage of consultation, it asks Department agencies to “strive to ensure that a notice is given at least 30 days prior to a scheduled consultation” or provide an explanation for abbreviated notification periods in the event of exceptional circumstances. *See* draft Policy at 5. We applaud the Department’s assertion that “the fact that an Indian Tribe may choose not to engage the [Tribal Governance Officer] does not relieve a Bureau or Office of its obligation to engage in consultation” in this Initiation stage. *Id.* at 6.

Equally significant is the draft Policy’s promotion of “on-going communications concerning issues affecting Indian Tribes” following the initial notification of the opportunity for consultation. *Id.* at 4. Early and ongoing tribal consultation, as prescribed in the draft Policy, maximizes the amount of meaningful input from tribes regarding a proposed agency action and

allows tribes to identify and comment on other issues that may arise during the consultation process.

Another positive aspect of the draft Policy is its use of various means for Department agencies to communicate with Indian tribes about Departmental actions with tribal implications, including meetings, telephone conversations, written notices, or convening workgroups of tribal leadership, and regular gatherings of tribes. *See id.* at 3-4. The draft Policy's avoidance of "impersonal forms of communication" is especially important given the fact that many Indian reservations and Alaska Native Villages are located at great distances from Department offices and urban centers. *See id.* at 3. We are confident that the Department's outreach to tribal leaders to solicit their views and recommendations will be rewarded with more informed decision making by the Department.

Similarly, we appreciate the draft Policy's incorporation of diverse consultation processes in the "Proposal Development Stage" of tribal consultation, such as negotiated rulemaking, tribal leader task forces, series of open meetings, and single meetings. *See id.* at 7. Such flexibility in the Department's tribal consultation procedures should be a primary objective of the finalized Policy, particularly when the subjects of consultation often vary in complexity.

We are additionally pleased with the draft Policy's outreach efforts. These include trainings "to improve the Department's capacity for promoting collaboration with Tribes and executing the consultation provisions," trainings "to improve sensitivity and understanding of traditional American Indian cultures and governments," and trainings "to describe the legal, trust, and protective obligation of the Federal-Tribal relationship." *Id.* at 3. The draft Policy also calls on the Department to advance tribal consultation throughout the federal government and inform legislators and other officials of the benefits of meaningful tribal consultation. *See id.*

The Department also proposes to "identify and seek to address impediments, both external and internal, to improving its consultation processes." *Id.* at 4. Such initiatives, if undertaken thoroughly and deliberately, will increase your agencies' understanding of the unique ways in which the Department's programs impact Indian tribes and Alaska Native communities, enhance tribal consultation practices across the agencies, improve the performance of tribal governments in administering Department programs, and strengthen tribal self-governance and self-determination. The Department's follow through concerning its commitment to training and outreach will be critical to the Department's ultimate success in achieving a meaningful tribal consultation policy.

### **III. Recommendations for Improving the Draft Department of the Interior Policy on Consultation with Indian Tribes**

We set forth below our recommendations for improving the draft Consultation Policy.

### **A. Recommendations Concerning the Reasons for Tribal Consultation**

We believe that an important omission from the Department's consultation policy is a statement concerning why consultation with Indian tribes is so important to the Indian tribes and Alaska Native villages. We believe that the proposed Tribal Consultation Policy for the Department of Health and Human Services' Administration for Children and Families (ACF) captures the importance of Tribal consultation:

"Self-determination and meaningful involvement for Indian Tribes in Federal decision-making through consultation in matters that affect Indian tribes have been shown to result in improved program performance and positive outcomes for tribal communities. The involvement of Indian Tribes in the development of public . . . policy allows for locally relevant and culturally appropriate approaches to public issues. Tribal self-government has been demonstrated to improve and perpetuate the government-to-government relationship and strengthen tribal control over Federal funding that it receives, and its internal program management."

75 Fed. Reg. 78710 (Dec. 16, 2010), ¶ 4 ("Tribal Sovereignty").

If Department personnel do not fully understand the importance to tribes that result from meaningful tribal consultation and honestly embrace the benefits of consulting with Indian tribes and Alaska Native villages, the policy objectives the Department hopes to achieve through meaningful consultation will not be met. We encourage the Department to make an affirmative statement in the proposed Policy, similar to the one made by ACF, concerning the importance to Indian tribes, Alaska Native villages and their members of meaningful Tribal consultation and to furthering the mission of the Department.

### **B. Recommendations on the Structure of the Draft Policy**

We appreciate the Department's attempts to address a multitude of tribal concerns in a single Policy. The draft Policy proposes many positive measures that will affect and improve communications between Department agencies and Indian tribes. However, we are concerned about the organization of these ideas within the Policy. In its ten primary sections, the draft Policy sets forth important guidelines and procedures for conducting tribal consultation, but recites them under broad subject matter headings without a clear or logical order. In order to reduce confusion and increase the efficacy of your tribal consultation efforts, we recommend that the Department develop a concise and well-organized Consultation Policy that is easier for tribes to follow.

As written, the draft Policy spreads related principles of tribal consultation across different sections of the document, but also groups a range of key consultation guidelines under the same subject headings. For example, the description of the Departmental activities appropriate for consultation—a component requiring significant discussion in any agency's

Consultation Policy—is located in the “Definitions” section of the Department’s draft Policy for the definition of the term “Departmental Action with Tribal Implications.” *See* Draft Policy at 2. However, in the substantive body of the draft Policy, the Departmental actions that trigger consultation are briefly referenced without further explanation of how a Department office determines that an action may have tribal implications. *See, e.g., id.* at 3, 5. The Department and its agencies are more likely to engage in meaningful consultation if the actions that trigger consultation are well understood by Department personnel.

Likewise, the draft Policy discusses the important process for tribal requests for consultation in sections that may not be obvious to tribal officials—in both the “Innovations in Consultation Practices” section (Sec. VII) and the over-inclusive “Consultation Guidelines” section (Sec. VIII). Meanwhile, descriptions of the various roles of Department officials are scattered throughout the draft Policy, *see id.* at 2-3 (Sec. III “Definitions”) and 6 (Sec. VIII “Consultation Guidelines”), while some provisions relating to agency accountability are included in sections other than the “Accountability and Reporting” section. *See id.* at 4-5, (Sec. VII “Innovations in Consultation Practices”), 8-9 (Sec. IX “Supplemental Policies”). Furthermore, the stages of consultation, which should be the backbone of any consultation policy, are embedded within the “Consultation Guidelines” of Sec. VIII of the proposed Policy.

As the Department works to finalize its Consultation Policy, it should consider reorganizing the Policy chronologically, beginning with the initial planning stage and the initiation of tribal consultation. The Department should then organize its consultation requirements under the appropriate stages of consultation. Next, for all other provisions, the Department should organize related principles and general guidelines together in relevant sections such as “Roles and Responsibilities of Department Officials” and “Agency Accountability and Performance Measures.”

Throughout the Department’s Consultation Policy, all provisions should be listed according to a logical structure, using either an outline format or bullet points, under helpful and descriptive headings. The Department has two primary audiences for its Tribal Consultation Policy; tribal officials interested in promoting and enhancing the government-to-government relationship through meaningful dialogue and Department personnel responsible for implementing agency policies for Indian tribes and Alaska Native villages and honoring the government-to-government relationship with tribes in a tangible and meaningful way.

### **C. Recommendations Concerning Consistency in the Draft Policy**

We also have concerns about apparent internal inconsistencies within the draft Policy. In order for tribes to better understand the Consultation Policy and to know what to expect from Department agencies, the Policy should set forth clear and unambiguous directives with respect to tribal consultation.

For example, the draft policy at one point states that Department agencies will be “open” to consultation opportunities initiated by tribes, *see id.* at 5 (Sec. VII “Innovations in

Consultation Practices”), but elsewhere requires the Tribal Governance Officer (“TGO”) to treat a consultation request as it would treat a request from a state government. *See id.* at 6 (Sec. VIII.C “Guidelines for Response to Request for Consultation”). The Department should clarify its position concerning how it will handle all written tribal requests for consultation.

We recommend that the final Consultation Policy be revised to provide that “Department agencies shall initiate consultation in response to a written tribal request when the agency activity that is the subject of the request may affect Indian tribes broadly or a particular tribe significantly, and the agency activity has not previously been the subject of tribal consultation.” This clarification is particularly important to address Department activities that may not be interpreted as affecting Indian tribes broadly, but where a particular tribe or a small group of tribes are uniquely impacted.

The express exclusion of “matters that [are] undertaken in accordance with an administrative or judicial order” from the draft Policy’s definition of “Departmental Action with Tribal Implications,” *id.* at 2 (Sec. III “Definitions”), appears to be inconsistent with the principle that the Policy “applies in all circumstances where statutory or Administrative opportunities to consult with Indian Tribes exist.” *Id.* (emphasis added). In our view, tribal consultation should occur whenever a Department agency contemplates any action that may have significant tribal impact, regardless of whether it is undertaken pursuant to an administrative or judicial order.

An agency may have broad discretion in complying with an administrative or judicial order, and the impacts of the agency’s options in how it chooses to comply with an administrative or judicial order should be assessed in consultation with tribes. To resolve these apparent inconsistencies in the draft Policy, the Department should clarify that its description of activities eligible for consultation is nonexclusive. It should also include compliance with administrative or judicial orders as a proper subject for consultation.

Another apparent inconsistency within the draft Policy relates to the participation of decision-makers in tribal consultation. The draft Policy states that:

The appropriate Departmental officials [involved in consultation] are knowledgeable about the matters at hand, are authorized to speak for Interior, and have decision-making authority in the disposition and implementation of a policy or are a program manager or staff who can ensure that Tribal concerns will be brought forward to final decision makers in the event that the decision makers are not present at the consultation meeting.

*Id.* at 1 (Sec. II “Guiding Principles”). However, the draft Policy’s “Consultation Guidelines” in Sec. VIII discuss the role and participation of the Tribal Governance Officer or other “appropriate representative” in the consultation process without making it clear that Department officials with decision-making authority will be involved in the consultation process. *See id.* at 5-7; *see also id.* at 2-3 (Sec. II “Definitions”) (defining the terms “Tribal Governance Officer” and “Tribal Liaison Official”).

While we appreciate the Department's efforts to identify the responsibilities of individual officers who will oversee and implement the tribal consultation process, we recommend that the draft Policy should explicitly clarify that every effort will be made to involve Department decision-makers in the most critical stages of consultation. Although there are situations where this may not be feasible, particularly during consultations involving technical staff with specific expertise, the Department should require the participation of senior agency decision makers at least once prior to taking final action. There is no substitute for the give-and-take that senior Department decision makers would miss if tribal consultations are more often than not held between Department staff and tribal officials. Department program officials often meet and interact with tribal representatives. But a tribe's express invocation of consultation or the Department's notice to tribes that a planned action warrants consultation should require that senior agency officials with decision making authority actively participate in the consultation.

We also recommend that the Department take advantage of its diffuse structure and the various levels at which Indian tribes or Alaska Native villages may pursue consultation with the Department. The Department should stress to all its agencies the importance that the Secretary places on meaningful consultation with tribes. The Department should ensure that a process is established for every Department office require that tribal recommendations made at the agency and regional office level be forwarded to senior Department officials with responsibility for implementing Department-wide policies.

A tribal consultation at the agency level may have Department-wide implications that can benefit every Indian tribe. If the Department has well-described procedures to ensure that such recommendations reach senior Department officials, it increases the likelihood that the proposal can be implemented on a Department-wide basis, rather than limiting the recommendation to the immediately affected Indian tribe only or to a particular agency or region. The Department should also have a process in place to track whether the tribal recommendations are implemented, modified or rejected and provide timely feedback to the tribal officials on the Department's final action as concerns the tribe's recommendations.

#### **D. Recommendations on How Consultation Should Occur**

The draft Policy's descriptions in Sec. VIII.D ("Consultation Guidelines") of the stages of consultation are a useful start for providing consistency in tribal consultation throughout all Department agencies. However, we recommend that the Department clarify with more specificity the core consultation efforts that will occur in each stage, as well as provide minimum timelines for each stage. For instance, the draft Policy's "Initial Planning Stage" (Sec. VIII.D.1) does not set forth an agency's responsibilities to tribes in this stage, nor does it include how tribal views are incorporated in "project scoping." *See* Draft Policy at 6-7. It is noticeably silent on whether tribal consultation is appropriate during "[i]nitial planning activities including efforts preparatory to issuance of draft regulations, administration proposals, legislation, and national or large-scale regional changes." *Id.*

With respect to this early stage of tribal consultation, we therefore urge the Department to: 1) state when an agency should initiate consultation while considering a federal action with tribal implications; 2) describe the role of tribes in the initial planning stage; and 3) show how initial planning activities may determine whether more exhaustive tribal consultation is ultimately appropriate.

The Department should also consider introducing a post-consultation “Tribal Response” stage in the process before and after any of its agencies undertake a final federal action. Specifically, the Policy should require Department agencies to inform tribes how they intend to proceed. Tribes should then have an opportunity to submit their views on the planned action and suggest improvements before a Department agency takes final action. This should occur prior to the draft Policy’s “Implementation of Final Federal Action Stage” (Sec. VIII.D.3) where “final decisions on Departmental Action should be communicated in writing to affected Tribes, with a short explanation of the final decision.” *Id.* at 8.

We further recommend that Department agencies should in all circumstances provide an explanation on how tribal views were incorporated in the administrative decision making, or in the alternative, justify its actions from the consultation record if a decision runs contrary to tribal interests or has been modified to accommodate other Departmental concerns. Finally, the Department should also solicit feedback from tribes after a final agency action is implemented. Department policies affecting Indian tribes and Alaska Native villages should not be static. Tribal feedback on the Department’s implementation of agency policies can provide valuable insight to the Department that can help Department agencies evaluate the success of a program or policy initiative. Final agency action should not be viewed by the Department as the end of the consultation process. Tribal consultation is an on-going and evolving process, the goal of which is to improve the delivery of Department services and programs to Indian tribes and Alaska Native villages and to improve the administration of these programs and services directly by the Indian tribes and Alaska Native villages themselves.

Department agencies should likewise be required to collaborate efficiently with state governments and other federal agencies in executing programs under the jurisdiction of multiple governmental entities. Such flexibility during the tribal consultation process is important because it allows tribes to fulfill the congressionally-mandated objectives of Department programs. Innovative approaches to consultation, such as those described in the draft Policy, *See id.* at 4-5 (Sec. VII “Innovations in Consultation Practices”), increase the ability of the Department to address issues that might impact Indian tribes or Alaska Native villages.

We note that the transportation arena is an area which can benefit from inter-agency and federal-state-tribal collaboration. The Indian Reservation Roads (IRR) Program is jointly administered by the Bureau of Indian Affairs (BIA) and the Federal Highway Administration (FHWA), within the Department of Transportation. Indian tribes have long sought to secure simplified award instruments that Indian tribes can enter into with states to obtain and expend Federal-Aid and other federal funds administered by state governments, including Highway Safety Improvement Program (HSIP) funds, on eligible tribal transportation projects. Yet these



agreements have proven illusive to obtain. States often impose unacceptable terms and conditions on Indian tribes (waivers of tribal sovereign immunity from suit, indemnification clauses, adjudication of claims in state courts, etc.) as pre-conditions to the receipt of these funds by Indian tribes.

The Department's innovative use of tribal consultation, in collaboration with FHWA and state officials, could provide an environment conducive to working through the issues that currently preclude the widespread transfer of transportation resources from state governments to Indian tribes.

We also urge the Department to add a provision to the draft Policy to encourage its agencies to evaluate the use of waivers of regulatory requirements as situations warrant. Statutory and regulatory changes can take years. When tribal consultation identifies regulatory impediments to effective tribal administration of programs and services that can be overcome through a waiver, Department agencies should consider such action.

Lastly, the Department should recognize in its Consultation Policy that there are times where consultation is required, but where privacy and protection of information are also of the utmost priority. For example, religious practices and tribal customary law may require strict confidentiality, especially concerning certain plants and wildlife, cultural property, and sacred sites. If Department agencies cannot assure such confidentiality, tribes may be reluctant to disclose important information necessary for making informed agency decisions.

The Consultation Policy should therefore guarantee that culturally sensitive information will not be made public, to the extent permitted by law. For administrative actions with religious or culturally sensitive implications, Department agencies should respect a tribe's requests for confidentiality, limit the number of agency employees with access to private information, and use up to date information technology in order to prevent unauthorized access to information.

#### **E. Recommendations Concerning Time Frames**

Department personnel should make decisions concerning tribal consultation in a timely manner. With few exceptions, the proposed Policy does not establish firm time frames for agency personnel to respond in writing to a tribal request for consultation for an agency's identification of a consultation opportunity, nor does the proposed Policy provide any time frames for how long agency personnel should take to act on tribal recommendations made to the Department as a result of the consultation. On too many occasions, the Department's agencies take too long to draft and implement policies that affect Indian tribes and Alaska Native villages. The delays are not due to tribal consultation but are the result of internal Departmental deliberations.

For tribal consultation to be meaningful, the Department must give thought to how tribal recommendations are to be integrated into Department decision-making. While some circumstances may require a longer timeframe, 30 days seems like a reasonable response time in

most cases. The Department must be sensitive to the timeliness of agency actions when structuring and implementing tribal consultations.

#### **F. Recommendations for Accountability and Transparency in the Consultation Process**

As the Department recognizes in the draft Policy, “[m]ethods that ensure accountability and reporting are essential to regular and meaningful consultation.” *See* Draft Policy at 4 (Sec. VI “Accountability and Reporting”). However, the final Policy should include other procedural safeguards to enhance accountability within the Department. First, the Consultation Policy should require certifications for all regulations and legislative proposals that Department officials complied with Executive Order 13175 in a meaningful and timely manner. *See* 65 Fed. Reg. at 67,251. Second, consultation should not be compartmentalized within an agency or regional office of the Department.

Although the draft Policy provides for annual consultation reports to be submitted to the Secretary of the Interior, the Policy should require more active monitoring of agencies’ consultation activities. We recommend that the draft Policy require Department agencies to maintain an online public listing of all of its consultation efforts and their status, and identify a single contact responsible for handling inquiries related to each consultation subject. By widely disseminating Tribal recommendations and taking advantage of the Internet and modern information-sharing technologies, the Department can empower Indian tribes and Alaska Native villages to take a more active role in providing feedback to the Department concerning its programs and services.

We also urge the Department to include tribes as vital participants in reviewing the effectiveness of its Consultation Policy. As written, the draft Policy merely states that “[t]he Department may consider soliciting Indian Tribes’ evaluation of consultation practices.” *Id.* at 4 (Sec. VII “Innovations in Consultation Practices”). However, as the draft Policy acknowledges elsewhere, “[t]he Department recognizes the value of communicating through a regular gathering of Indian Tribes which are meant to continue the discussion on improving consultation practices and the government-to-government relationship generally.” *Id.* at 4 (Sec. V “Communication”). Thus, on an annual or biannual basis, the Policy should require formal opportunities to solicit tribal views, such as at national consultation meetings and regularly scheduled consultation review sessions with Department officials. Because tribes situated in a particular region often share common needs, the Department should also consider holding regional consultation sessions to develop priorities for national meetings. We also encourage the Department not to overlook the role of national tribal organizations and federal advisory bodies with tribal representatives when requesting information and feedback from tribal governments.

Similarly, while we applaud the draft Policy’s commitment to hosting meaningful training opportunities, *id.* at 3 (Sec. IV “Training”), Indian tribes and Alaska Native villages should play a significant role in developing any training programs for Department employees. We have found that internal training activities in the federal government are only as effective as

the amount of knowledge and preparation invested in such educational programs. Accordingly, to further an “understanding of traditional Indian cultures and governments,” the Department should make such training mandatory for all Department personnel who interact with tribes, while also requiring the involvement of tribal members, academics, or other tribal experts and advocates. To carry out training concerning the “legal, trust and protective obligation of the Federal-Tribal relationship,” we recommend that the Department’s Office of the Solicitor be integrated into the Department’s training program.

#### **IV. Conclusion**

The success of the Department of the Interior’s tribal programs is wholly dependent on the decisions your agencies make and the amount of tribal participation in making these decisions. We therefore appreciate the opportunity to submit these comments for the Department’s consideration on behalf of our tribal clients.

Respectfully Submitted,

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